

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

APR 15 1996

In the Matter of	)	
	)	
Amendment of Part 20 and 24 of the	)	
Commission's Rules -- Broadband	)	WT Docket No. 96-59
PCS Competitive Bidding and the	)	
Commercial Mobile Radio Service	)	
Spectrum Cap	)	
	)	
Amendment of the Commission's	)	GN Docket No. 90-314
Cellular PCS Cross-Ownership Rule	)	

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COMMENTS OF AT&T WIRELESS SERVICES, INC.

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**COMMENTS OF AT&T WIRELESS SERVICES, INC.**

AT&T Wireless Services, Inc. ("AT&T") hereby submits its comments on the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.

**I. Introduction and Summary**

AT&T supports the Commission's objective of encouraging diversity of ownership. As the Commission acknowledges, however, the current race and gender-based preferences for F block bidders raise complicated constitutional issues. AT&T is thus concerned that inclusion of such provisions will delay the auction and mire the Commission and potential bidders in significant litigation.

Moreover, recent experience has shown that establishment of a small business set aside is not the best means to achieve the Commission's diversity objectives. Accordingly, AT&T urges the Commission to provide an appropriate bidding credit and an installment payment plan for qualified bidders on the F block only. Other bidders should not, however, be precluded from bidding for F block licenses.

AT&T also urges the Commission to eliminate the cellular/PCS cross-ownership rule. This safeguard is unnecessary in light of the similar result obtained through the 45 MHz spectrum cap. The Commission, likewise, should loosen the attribution rule associated with the spectrum cap to exclude parties with non-controlling interests in commercial mobile radio services ("CMRS") spectrum.

Finally, the Commission should take this opportunity to delete the bans on spectrum disaggregation and geographic partitioning. These provisions are unnecessary to deter anticompetitive conduct or circumvention of construction requirements. Rather, they inhibit the development of new products and services by preventing parties from realizing the full value of the licenses they purchased at auction.

**II. The Commission Should Not Distort the Auction for the 10 MHz Blocks by Including Designated Entity Preferences**

**A. Race and Gender-Based Preferences Will Not Pass Constitutional Muster**

After the Supreme Court's decision in Adarand Constructors, Inc. v. Pena,<sup>1/</sup> the Commission eliminated the special provisions for minorities and women associated with the C block PCS auction.<sup>2/</sup> The Commission correctly concluded that the record in the auction proceeding would not support race and gender-based

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<sup>1/</sup> 115 S. Ct. 2097 (1995).

<sup>2/</sup> See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, PP Docket No. 93-253, 60 Fed. Reg. 37786 (released July 21, 1995).

preferences under a strict scrutiny standard of review. Indeed, it is not clear that such measures would withstand intermediate scrutiny, as evidenced by the D.C. Circuit's stay of the C block auction prior to the Adarand decision.<sup>3/</sup>

While AT&T supports the Commission's goals of increasing diversity in communications ownership, it is doubtful that an adequate record could be compiled to meet the Adarand standard. For over two years, the Commission has repeatedly requested that parties provide concrete evidence of discrimination in the communications industry in order to support race and gender-based preferences for PCS auctions. A congressional hearing was held for the purpose of supplementing the record in this regard.<sup>4/</sup> For the most part, however, the evidence submitted consists of generalized assertions of discrimination and underrepresentation.<sup>5/</sup> As the Commission acknowledges, this evidence is insufficient to demonstrate a compelling interest under the strict scrutiny standard.

Given these circumstances, it makes no sense either to apply race and gender-based preferences to the F block auction in the absence of a sufficient record or to delay the auction with the hope of gathering such a record. The Commission should eliminate

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<sup>3/</sup> Telephone Electronics Corp. v. FCC, No. 95-1015 (D.C. Cir. March 15, 1995) (order granting stay).

<sup>4/</sup> Hearing before the U.S. House of Representatives Committee on Small Business, Subcommittee on Minority Enterprise, Finance, and Urban Development (May 20, 1994).

<sup>5/</sup> Notice at ¶ 19.

such provisions from its rules and proceed with the auction for the D, E and F blocks expeditiously.

**B. The Commission Should Delete the Small Business Provisions from its F Block Rules**

The Commission's current rules convert the F block into an entrepreneurs' block, which is open only to so-called entrepreneurial businesses. In addition, these businesses and businesses that qualify as "small" are eligible for various installment payment plans and bidding credits. The Commission should look closely at the undesirable results of the C block auction before it makes a decision to retain or extend these rules.

The C block auction was intended to satisfy the congressional directive that the Commission provide opportunities for small businesses, minorities and women to participate in wireless services. The Commission created the entrepreneurs' block as a means to provide a more level playing field for such businesses through the exclusion of large bidders. The C block auction demonstrates, however, that this worthy goal is not attainable through manipulation of the auction process.

Even when the value of the 25 percent bidding credit is considered, the C block applicants are bidding well above the prices paid by their A and B block counterparts. The current average net price per pop of the C block licenses is almost \$39.00, more than twice the average per pop price of the A and B block authorizations. To say the least, it is not readily apparent how a business can be considered "small" when it is

bidding four billion dollars for licenses today and expecting to pay billions more for build-out tomorrow.

That question seems to be foremost in the minds of the C block bidders, as well. The Commission recently has been inundated with petitions and letters from frustrated applicants seeking to have other applicants disqualified because of their large, often foreign, sponsors.<sup>6/</sup> Most likely, this litigation will continue over the next several years, through the petition to deny process and in court, delaying service to the public and calling into question the integrity of the auction itself. Considering that almost no legitimate small businesses will ultimately own significant spectrum, it does not appear that the ends justify the enormous problems associated with the process.

The Commission should not repeat this experiment in the F block auction. All three spectrum blocks should be open to all bidders without the need to make difficult decisions about de facto control in the face of questionable funding arrangements. While the entrepreneurs' block may have been an appropriate tool to provide more opportunity for women and minority-owned businesses, its use is not justified to provide opportunity for allegedly small businesses that receive 100 percent of their financing from nonqualified parties. Diversity is an important

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<sup>6/</sup> See e.g., Petition To Dismiss or in the Alternative For Evidentiary Hearing, filed by NextWave Telecom Inc. (March 12, 1996); Letter from GO! Communications Corporation to Hon. Reed Hundt (March 12, 1996).

objective, but it is clear that this objective will not be met through setting aside spectrum.

If the Commission nevertheless determines that small business provisions are appropriate for this auction, it should provide a simplified installment payment plan and an appropriate bidding credit for such bidders. Most importantly, the Commission should confine any such preferences to the F block.<sup>77</sup> In light of the experience with the C block auction, it is wholly inappropriate to further distort the market by adding more rules to the only remaining open spectrum blocks. Not only are these provisions unlikely to achieve their intended result, they will probably tie up the auction in regulatory red tape, cause the Commission to use its restricted resources to administer what should be a simple process, and potentially delay the roll out of services to the public. Moreover, attaching special provisions to the D and E blocks at this late date is likely to frustrate bidders' expectations created by the existing rules for this spectrum. AT&T, for example, has predicated critical business plans on the auction structure established by the Commission last year. Changes to this structure might well hinder these plans and further delay the deployment of new products and services.

While AT&T, for efficiency reasons, is in favor, of one consolidated auction, it believes that the Commission should

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<sup>77</sup> This methodology worked relatively well in the regional narrowband PCS auction, where several minority and women-owned businesses were able to obtain all the authorizations available on the block with bidding credits and installment payment plans.



auction the F block separately if that block is not open to all bidders. The auctions could be held concurrently, however, and F block bidders could bid for D and E licenses to the extent they have qualified through submission of a separate application and upfront payment. If distinct qualification is not required, small businesses interested primarily in the F block could engage in strategies aimed solely at increasing prices in the other blocks. Because they are precluded from bidding in the F block, the non-small business bidders would have no means to counter such strategies. Small entities wishing to obtain spectrum in any of the blocks should be required to demonstrate their bona fide interest by submitting a separate application and upfront payment for the D and E blocks.<sup>8/</sup>

**C. Upfront Payments for all Three Blocks Should be Increased to Deter Fraudulent Bidding and Potential Default**

As the bids skyrocket in the C block auction, the Commission is faced with the troubling prospect of whether bidders will be able to meet their down payment obligations and what should be done in the event of default. While the upfront payment was intended to ensure that only serious and qualified bidders participate in the auction, in most cases, the anticipated ten percent down payment already dwarfs the funds on hand at the

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<sup>8/</sup> One easy way to avoid this situation would be, as AT&T suggested above, to open the F block to all bidders and consider whether small business bidding credits and installment payments are appropriate for that block only.

Commission. Accordingly, if a high bidder defaults, there will be no source of ready funds to cover penalties.

To avoid this situation for the next PCS auction, the Commission should increase the upfront payment for all three blocks and for all parties to \$.10 per MHz-pop. While a discounted upfront payment could potentially encourage the participation of some capital-constrained companies, the truth is that these companies will need to deliver much larger payments as soon as the auction is over. If they are unable to compile the necessary funds prior to the auction, there is a good chance that they will be unable to meet their payment obligations after the auction.

In addition, because it is impossible to predict the ultimate level of bids in the D, E, and F block auction, the Commission should institute a mechanism to ensure that a party's upfront payment remains commensurate with its bidding activity. Specifically, the Commission should require an applicant to supplement the funds it has on deposit at the Commission during the auction at any point where its upfront payment drops below four percent of the amount it has bid.<sup>9/</sup>

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<sup>9/</sup> To deter fraudulent bidding, this four percent figure should be tied to the amount bid rather than to the applicant's high bid amount. This will help prevent anticompetitive strategies by non-serious bidders.

**III. The Commission Should Eliminate the PCS/Cellular Cross-Ownership Rule and the 40 MHz Spectrum Cap and Relax the Associated Attribution Rules**

In light of the Sixth Circuit Court of Appeals' remand in Cincinnati Bell Telephone Co. v. FCC,<sup>10/</sup> the Commission asks whether it should retain or relax its PCS/cellular cross-ownership rule. The Commission notes that this rule is just one of several spectrum caps that affect CMRS licensees and suggests that these ownership rules could be simplified by eliminating all but the general 45 MHz cap on wireless spectrum.

AT&T proposes that the Commission delete the cellular/PCS cross-ownership rule and the 40 MHz PCS spectrum cap in favor of a single 45 MHz spectrum cap. Given the number of CMRS licensees currently in, and about to enter, the market as a result of the PCS and SMR auctions, there is little danger of undue influence and anti-competitive behavior associated with allowing cellular licensees to obtain up to 20 MHz of PCS spectrum that overlaps their cellular operations.

No matter which spectrum cap rule or rules the Commission decides to retain, it should adopt one attribution standard that applies to all CMRS licensees. The CMRS attribution rules currently contain various thresholds -- five percent for PCS licensees, 20 percent for cellular licensees, and 40 percent for small businesses and rural telephone companies -- which render the rules unnecessarily complicated and burdensome. A single ownership rule and a single attribution rule would both

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<sup>10/</sup> 69 F.3d 752 (6th Cir. 1995).

accomplish the Commission's goal of maximizing competition and adhere more closely to Congress's objective of regulatory parity for all CMRS licensees.

AT&T further proposes that the Commission adopt an attribution standard based on control.<sup>11/</sup> The Commission's concern that a control test might burden the licensing process is unjustified. A de jure control standard that attributes any interest greater than 50 percent could be interpreted and administered just as easily as the current 20 percent rule. Although de facto control issues often are difficult, contrary to the Commission's suggestion, the 20 percent test does not free the agency from making such determinations. Indeed, the actual interest owned by a party is just the starting point in determining eligibility; the Commission must also consider whether the affected licenses are "directly or indirectly owned, operated, or controlled by the same party."<sup>12/</sup>

In the alternative, AT&T suggests that the Commission adopt the 40 percent threshold that was used in the C block auction. There is no evidence that this attribution rule created opportunities for anticompetitive behavior in that auction or that it will cause problems in the post-auction market.

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<sup>11/</sup> While AT&T believes that the 20 percent attribution standard is unnecessarily restrictive, the Commission's decision was based on the limited information it then possessed about the development of the auctions and the PCS market. At this time, however, with three new competitors poised to enter the market imminently, it is clear that relaxation of the attribution rule will not have the feared detrimental effects.

<sup>12/</sup> 47 C.F.R. § 24.204(a).

Similarly, there is no reason to believe that relaxing the attribution rule for all CMRS applicants and licensees will have any undesirable effects.

**IV. There is no Need to Retain the Spectrum Disaggregation and Geographic Partitioning Prohibitions**

In determining whether there should be limits on spectrum aggregation (*i.e.*, spectrum caps) by PCS licensees, the Commission also determined that spectrum disaggregation should not be permitted at this time.<sup>13/</sup> The Commission reasoned that, if allowed to divide spectrum, several parties might purchase one viable 30 MHz license in an effort to reduce the number of new entrants. This concern was speculative at best, and, given the level of competition in the PCS auctions, it does not appear to be realistic today. Indeed, it is likely that permitting disaggregation will encourage entry by small businesses that do not have the wherewithal to participate in an auction.

Likewise, geographic partitioning would increase the diversity of PCS licensees by allowing small entities to purchase an authorization for a portion of a service area. Rather than resulting in a circumvention of construction requirements, as the Commission originally feared,<sup>14/</sup> permitting applicants and licensees to subdivide PCS blocks and service areas will promote the build-out of wireless systems in all areas of the country.

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<sup>13/</sup> Amendment of the Commission's Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC Rcd 4957, ¶ 69 (1994).

<sup>14/</sup> Id. at ¶ 83.

For example, an MTA licensee could easily meet its five-year construction requirements by focusing on one metropolitan area, while ignoring smaller communities. There undoubtedly are a number of providers willing to build out and supply service more expeditiously to those areas. There is no reason to preclude these arrangements.

Accordingly, AT&T urges the Commission eliminate the spectrum disaggregation and geographic partitioning rules. If the Commission feels that further notice and comment is necessary before taking this step, it should issue a notice of proposed rulemaking promptly.

#### CONCLUSION

For the foregoing reasons, AT&T respectfully requests that the Commission adopt the proposals set forth above regarding the 10 MHz PCS auctions, the CMRS ownership rules, and elimination of the spectrum disaggregation and geographic partitioning prohibitions.

Respectfully submitted

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**CERTIFICATE OF SERVICE**

I, Tanya Butler, hereby certify that on this 15th day of April, 1996, I caused copies of the foregoing Comments of AT&T Wireless Services, Inc. to be served on the following by first-class mail, postage prepaid, or by messenger (\*) to the following:

  
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